IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-48

THE SANKO STEAMSHIP CO., LTD.,

Petitioner,

—against—

NEWFOUNDLAND REFINING COMPANY LIMITED, NEWFOUNDLAND REFINING COMPANY LIMITED U.S.A., PROVINCIAL BUILDING COMPANY LIMITED, PROVINCIAL REFINING COMPANY LIMITED, PROVINCIAL HOLDING COMMPANY LIMITED and SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF THE WRIT

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To the Honorable the Chief Justice and Associate Justices of The Supreme Court of the United States:

Opinions Below

The decisions of the United States District Court for the Southern District of New York and the decisions of the United States Court of Appeals for the Second Circuit

affirming the decision of the District Court and denying rehearing are attached to the Petition.

Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition.

Question Presented

The question presented is not as stated in the Petition, but, based on the full facts as set forth herein, should be "Did the Court of Appeals correctly interpret the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) in affirming the decision of the District Court dismissing an action commenced by Plaintiff, a Japanese corporation, claiming damages for breach of three charter parties entered into with a Newfoundland corporation, for the charter of three vessels of foreign registry, when the charter parties expressly provided that "Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree. . . ."

Statement of the Case

Petitioner claims to have invoked the provisions of Supplemental Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In fact, Petitioner did no such thing. In the affidavit in support of Petitioner's Order to Show Cause, dated February 17, 1976, on which the attachment here involved was based, no mention whatsoever was made concerning the Admiralty Rules. The affidavit specifically states:

> "8. Defendants as aforesaid are foreign corporations, and plaintiff seeks an order of attachment pursuant

> to Rule 64 of the Federal Rules of Civil Procedure, which provides as follows: [Quoting Rule 64]"

The Petitioner, a Japanese corporation, entered into three charter parties with a Newfoundland corporation for the hire of three foreign flag vessels, in which charter the parties agreed that:

> "40(a) This charter shall be construed and the relations between the parties determined in accordance with the law of England.
>
> "(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile may be.
>
> "Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the Arbitration Act, 1950. . . ."

The only connection *whatsoever* this case has with the United States is that the Respondents, all affiliated companies, happened to maintain bank accounts in New York City.

ARGUMENT

Petitioner's Point A

Petitioner argues that the decisions below have the effect of changing "a substantial segment of Admiralty law". Having made its original application under Rule 64 of the Federal Rules of Civil Procedure, and *not* under the Supplementary Admiralty Rules, this argument appears to fall of its own weight.

It is respectfully submitted that *no* question of Admiralty law is here involved; that the entire matter is a

simple matter of contract law, and the proper interpretation of Section 6201(1) of the New York Civil Practice Law and Rules.

First. The parties contracted for a specific forum and Petitioner should not be permitted to breach its solemn undertaking. This Court's decision in *Bremen* was decided June 12, 1972, two months prior to the execution of the charter parties here in question. Certainly, the parties and their counsel involved in three multi-million dollar ship charters were well aware of this Court's decision in *Bremen.* Had the parties wished to invoke the protection of the United States Admiralty Rules, they could have so provided in the charter parties; to the contrary, they specifically opted for the laws of England.

Indeed, the forum selection clause in the instant case is far broader than that involved in *Bremen,* which simply stated that:

> "Any dispute arising must be treated before the London Court of Justice". (407 U.S. at 2)

It appears specious to argue that where two foreign corporations agree on English law and English courts to settle their disputes, the enforcement of such a contractual provision by a United States Court somehow changes the United States Admiralty law. The Courts below merely required the parties to carry out what they bargained for.

Second. The decision of this Court in *Bremen* specifically dealt with the question of *in rem* actions and held as follows:

> "For the first time in this litigation, Zapata has suggested to this Court that the forum clause should not be construed to provide for an exclusive forum or to include *in rem* actions. However, the language of the clause is clearly mandatory and all-encompassing; . . ." (407 U.S. at 20)

If an *in rem* action will not lie in the face of a forum selection clause, *a fortiori,* a writ of attachment will not lie.

In the face of this clear and *explicit* holding, Petitioner entered into the instant charter parties with far more explicit and "all encompassing" language than was contained in the *Bremen* charter.

Petitioner argues that:

> "Clearly, this Court did not decide the issue whether one party to an agreement containing a foreign forum selection clause, assuming it was valid, was precluded from maintaining an action outside the selected forum and obtaining security pending determination of the dispute in the selected forum." (Petition, p. 7)

It is respectfully submitted that even if this Court had *not* specifically extended its holding in *Bremen* to include *in rem* actions, which it clearly did, but had excluded *in rem* actions from the scope of the decision (as Petitioner erroneously argues it did), the contractual language here involved would nevertheless dictate that the decisions below were correct.

Not only were the charter parties to be construed in accordance with English law, but "the *relations* between the parties" were to be "*determined* in accordance with the law of England."

Certainly any reasonable construction of this language would include provisional remedies either party might seek against the other, including writs of attachment.

It is respectfully submitted that the decision of this Court *squarely held* that a party may *not* do as Petitioner

suggests and bring any action outside the selected forum, for the purpose of security or otherwise:

> "Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or *if jurisdiction were left to any place where the Bremen or Unterweser* [the corporate owner of *Bremen*] *might happen to be found.*[15] The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an *indispensable element* in international trade, commerce and *contracting.*" [Emphasis supplied]

"[15] At the very least, the clause was an effort to eliminate *all uncertainty* as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves. Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English Courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. . ." (407 U.S. at 13-14; emphasis supplied)

In support of its argument, Petitioner relies on a number of decisions decided prior to this Court's decision in *Bremen.* It is submitted that the *post Bremen* decisions are uniformly in agreement with the decision of the Court below in requiring dismissal of the complaint.

Bremen has been applied by the First and Ninth Circuit Courts of Appeals so as to require dismissal of the complaint where an action has been brought in a United States District Court in violation of a "forum selection" clause. Thus, in *Fireman's Fund* v. *Puerto Rico Forwarding Co.,* 492 F.2d 1294 (1st Cir. 1974), the Court affirmed a judgment of the United States District Court in Puerto Rico dismissing the complaint for lack of jurisdiction on

the basis of a "forum selection" clause contained in the defendant's bill of lading designating state or federal courts located in New York City as the forum for any actions brought under such bills.

Similarly, in *Republic International Corporation* v. *Amoco Engineers Inc., et al.,* 516 F.2d 161 (9th Cir. 1975), the Court reversed the trial court's denial of a motion to dismiss based upon a "forum selection" clause stating:

> ". . . we hold that this action should have been dismissed because of the forum selection clauses in the construction contracts, which provide that suit must be brought in the courts of Uruguay. This holding follows the reasoning of the Supreme Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed. 2d 513 (1972); see Roach v. Hapaq-Lloyd, 358 F.Supp. 481 (N.D.Cal. 1973); Jack Winter, Inc. v. Koratron Co., 326 F.Supp. 121 (N.D.Cal. 1971)."

In that case, a default judgment had been entered against the Ministry of Public Works, Republic of Uruguay, one of the defendants, following the District Court's denial of the motion to dismiss.

In *Gaskin* v. *Stumm Handel,* 390 F.Supp. 361 (S.D.N.Y. 1975) the District Court not only dismissed the complaint on the ground of a "forum selection" clause but also vacated an attachment which had been granted by the New York Supreme Court prior to removal of the action to the District Court.

Forum selection clauses also provided the ground for the dismissal of complaints in *Spatz* v. *Nascone,* 364 F. Supp. 967 (W.D.Pa. 1973) and *Roach* v. *Hapaq-Lloyd A.G.,* 358 F.Supp. 481 (N.D.Cal. 1973).

Since dismissal is required in the case of a suit for damages, and since Section 6201(1) of the New York Civil Practice Law and Rules requires a pending "action", the attachment could not stand.

Petitioner's Point B

Petitioner complains that the decision below implicitly held that ". . . the use of State Court remedies provided for by Supplemental Rule B(1) cannot be used where the contract contains a foreign forum selection clause."

If foreign parties to Admiralty contracts wish to avail themselves of the United States Admiralty Rules, certainly it would be simple enough for them to so provide in their agreements. Petitioner did not so do and should not be heard to complain.

Petitioner's Point C

Petitioner argues that the decision below invalidates Section 8 of the Federal Arbitration Act (9 USCA).

Since the action below was not brought under the Federal Arbitration Act no issue with respect thereto is involved.

Petitioner did not want its claim arbitrated and neither did Respondent,* so the entire question of the applicability of the Federal Arbitration Act would appear moot.

Petitioner would have it that under circumstances as here presented, a "game" is played before the Court. Petitioner ignores the arbitration clause and the English forum selection clause and files suit for damages in New York;

* After the decision in the Court of Appeals below, Petitioner commenced two *legal actions* in London under the charter parties.

Respondents, not wishing to arbitrate the matter, but to litigate it in the selected forum, move to dismiss the complaint; somehow, argues Petitioner, the Court is required by the Federal Arbitration Act (which neither party has invoked) to stay the action pending a foreign arbitration which is never going to take place.

It is respectfully submitted that Petitioner is "hoist with his own petard". The mere bringing of the action for damages constitutes a waiver of the right to arbitration (*La National Platanera* v. *North American F. & S.S. Corp.*, 84 F.2d 881 (5th Cir. 1936); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (2nd Cir. 1942)), and a waiver of the provisions of the Federal Arbitration Act.

Here, the (inapplicable) Federal Arbitration Act has a specific provision for a stay pending the arbitration proceedings, if such is sought; Section 6201(1) of the New York Civil Practice Law and Rules under which Petitioner sought its attachment has no provision for a stay pending litigation elsewhere. The failure of New York State to include such a provision in its Civil Practice Law and Rules does not, it is respectfully submitted, create any Federal issue.

CONCLUSION

For the reasons stated above, Respondents say that a Petition for a Writ of Certiorari should be denied.

Dated: August 4, 1976.

Respectfully submitted,

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